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IN THE

Supreme Court of the United States

APPALACHIAN POWER COMPANY, *et al.*,
Cross-Petitioners

v.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, *et al.*
Cross-Respondents

On Conditional Cross-Petition for a Writ of Certiorari to the United States Court of Appeals For the District of Columbia Circuit

REPLY BRIEF FOR CONDITIONAL CROSS-PETITIONERS APPALACHIAN POWER COMPANY, *et al.*

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RULE 29.6 DISCLOSURE STATEMENT

Pursuant to Rule 29.6, CAA Industry Cross-Petitioners hereby amend the corporate disclosure statement filed with the conditional cross-petition for a writ of certiorari. (Case No. 99-1431). The page numbers of the conditional cross-petition for a writ of certiorari on which CAA Industry Cross-Petitioners requiring amended statements appear are provided for convenience.

Carolina Power & Light Co (p. x)
(10% or greater owner: State Street Bank & Trust Co. Boston)

Detroit Edison Co., The (p. xi)
(a subsidiary of DTE Energy Co.)

Meridian Gold Co. (p. xi)
(a wholly-owned subsidiary of Meridian Gold, Inc.)

Newmont Gold Co. (p. xi)
(10% or greater owner: Newmont Mining Corporation)

Otter Tail Power Co. (p. xi)
(10% or greater owner: Otter Tail Power Co. ESOP)

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ARGUMENT

In its response, EPA describes the "fundamental question" here as not the constitutionality of the Clean Air Act ("CAA" or "Act"), but a much narrower issue: whether the nondelegation doctrine constrains the Agency's discretion as it applies the Act. EPA's re-framing of the issue confirms that, in any review of the lower court's non-delegation holding, this Court must address the nature and scope of the Agency's authority to define "intelligible principles" for making risk management decisions. That is, if certiorari is granted, the question of whether the nondelegation doctrine constrains the Agency's discretion cannot be resolved without this Court examining the nature of the congressional delegation -- an inquiry that requires review of the issue as presented by CAA Industry Cross-Petitioners.

I. THE NATURE OF EPA'S AUTHORITY UNDER CAA § 109 IS CRITICAL TO EVALUATION OF THE NONDELEGATION ISSUE.

This case concerns EPA's extraordinary claim of authority to make risk management decisions without guiding principles. Based on *Lead Industries* and cases that have relied upon it,[1] EPA argued to the lower court that "nothing in the statute requires [the Administrator] to make any specific 'findings' or to structure her decisionmaking in any particular way" when she judges risk under CAA § 109, even when her choices lie along a continuum of uncertain and indistinguishable health risks. EPA Resp. Br. (D.C. Cir. 97-

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[1] *Lead Industries Ass'n v. EPA*, 647 F.2d 1130 (D.C. Cir. 1980); *American Petroleum Inst. v. EPA*, 665 F.2d 1176 (D.C. Cir. 1981); *NRDC v. EPA*, 902 F.2d 962 (D.C. Cir. 1990).

1441) 43. Indeed, EPA argued that when confronted with uncertain and indistinguishable health risks, it may elect to revise NAAQS as a policy matter even without a finding that that action is needed to respond to "significant risk."[2]

It was this interpretation of CAA § 109 that led Non-State CAA Petitioners (CAA Industry Cross-Petitioners here) to argue that, because EPA interprets § 109 of the Act to require no findings that a revised NAAQS will demonstrably improve the public health, "EPA improperly reads § 109 as a standardless delegation of authority." Non-State CAA Pet'rs and Intervenors Reply Br. (D.C. Cir. 97-1441) 17. And it was this assertion by EPA of unbounded public health policy judgment that led the lower court to hold that EPA's interpretation of the Act raised "nondelegation" concerns.

In its petition for certiorari, EPA claimed that the lower court's nondelegation ruling was worthy of certiorari because it "conflicts with this Court's decisions upholding congressional enactments containing far broader grants of authority" than the CAA and "raises questions respecting the constitutionality of a broad range of federal statutes." EPA Pet. 9. In response, CAA Industry Cross-Petitioners observed that the lower court "did *not* question Congress'

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[2] EPA Resp. Br. (D.C. Cir. 97-1441) 42. While EPA argues that the significant risk standard of *Industrial Union Dept., AFL-CIO v. API*, 448 U.S. 607 (1980) is not applicable, the "significant risk" standard has been endorsed by Congress as the threshold for public health regulation under the Clean Air Act. *See* H.R. Rep. 95-294, at 3, 48-49 (1977) *reprinted in* 4 Sen. Comm. on Env't and Pub. Works, *A Legislative History of the Clean Air Act Amendments of 1977*, at 2470, 2515-16 (Comm. Print 1978) ("1977 Legis. Hist."); *Ethyl Corp. v. EPA*, 51 F.3d 1053, 1063 (D.C. Cir. 1995); *Ethyl Corp. v. EPA*, 541 F.2d 1, 16, 31-32 (D.C. Cir. 1976).

authority to legislate in broad terms," "[n]or did the court hold that § 109 is unconstitutional." CAA Ind. Resp. 13.

EPA now agrees that the lower court did not attack the constitutionality of the CAA. EPA therefore re-frames the question as follows:

> The fundamental question here remains whether the nondelegation doctrine provides constitutional limitations on an agency's action.

EPA Resp. 20; *see also* EPA Reply 3-4. The cases cited by CAA Industry Respondents show that it clearly does.[3]

In clarifying the issue on which it seeks certiorari, EPA demonstrates why certiorari, if it is granted, must address the nondelegation issue as presented by CAA Industry Cross-Petitioners. As this Court has explained, there is nothing wrong with broad delegations so long as the agency articulates the principles by which it exercises its authority.

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[3] *See Mistretta v. United States*, 488 U.S. 361, 374 n.7 (1989) (nondelegation doctrine requires narrow construction of statutes that might otherwise be unconstitutional); *Industrial Union Dep't*, 448 U.S. at 646 (plurality opinion) (agency should be allowed to characterize statute in a way to avoid unconstitutional delegation); *National Cable Television Ass'n, Inc. v. United States*, 415 U.S. 336, 342 (1974) ("the hurdles revealed in [*A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495 (1935) and *J.W. Hampton, Jr. & Co. v. United States*, 276 U.S. 394 (1928)] lead us to read the [Independent Offices Appropriation Act] to avoid constitutional problems"); *Zemel v. Rusk*, 381 U.S. 1, 17-18 (1965) (construing statute so as to avoid an invalid delegation); *Kent v. Dulles*, 357 U.S. 116, 129 (1958) (the act in question does "not delegate to the Secretary the kind of authority exercised"); *AT&T Corp. v. Iowa Utils. Bd.*, 525 U.S. 366, 388-89, 119 S.Ct. 721, 734-35 (1999); *see generally* CAA Ind. Resp. 14-16 (and accompanying notes).

And the Agency cannot get those principles right unless it follows the guidance Congress gave it in making the delegation. If, as EPA *now* agrees, the question is whether nondelegation constrains the Agency's discretion as it applies the statute, then the issue can be resolved only by examining the terms of Congress' delegation, requiring this Court to address precisely what those terms are.[4]

II. THE LOWER COURT'S HOLDING THAT EPA, IN DEFINING AN INTELLIGIBLE PRINCIPLE, MUST IGNORE FACTORS CRITICAL TO SOUND POLICY JUDGMENT IS AN ISSUE OF EXCEPTIONAL IMPORTANCE.

In attempting to explain why the issue presented by Cross-Petitioners is, in its view, not worthy of certiorari, EPA mischaracterizes it. EPA argues strenuously that the cost or technological feasibility of pollution controls should not be allowed to override protection of public health. *See, e.g.*, EPA Resp. 6, 9. But this is not the issue; no one in this case is arguing that public health protection is not the primary purpose of NAAQS.

Rather, EPA's own science advisers have found that uncertainties in the scientific data related to both particulate matter and ozone are so large that it is not clear that revising the NAAQS will improve public health. *See* CAA Ind.

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[4] For this reason, Massachusetts and New Jersey are incorrect in asserting that the question presented in our conditional Cross-Petition "is not properly presented at this time." *See* Mass. & NJ Resp. 9-10 n.5. For the same reason, while EPA acknowledges that the D.C. Circuit would be required to engage in arbitrary and capricious review on remand, *see* EPA Resp. 19, such review is not possible until EPA defines the legal standard (or "intelligible principle") governing Agency action. *See* CAA Ind. Cross-Pet. 17.

Cross-Pet. 11-12. Against this background, Cross-Petitioners have asked this Court to address whether EPA is constrained to exercise its discretion in a manner that promotes the "public health" generally *and* effectuates the broad congressional purposes of the Act as enunciated in CAA § 101(b), CAA ICP App. 1a. *See* CAA Ind. Cross-Pet. 6, 21-22.

EPA fails to address the real issue here -- that it chose among alternative standards any of which would protect against small and uncertain health risks with no discernible principle for choosing. The only thing EPA can tell us precisely is what principle it did *not* apply, and that is consideration of "costs." Indeed, so devoted is EPA to the "no cost" principle that it prefers to ignore health "costs" (i.e., cancer and cataracts) from increased UVB radiation exposure, hardly a process that promotes the "public" health. *See also* EPA App. 15a, n.4.

EPA asserts that it is precluded from considering factors that one would normally associate with sound risk management judgment[5] by the language of § 109(b), which requires that NAAQS be "requisite to protect the public health."[6] EPA App. 111a. But EPA completely ignores

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[5] *See, e.g.*, Stephen Breyer, *Breaking the Vicious Circle* 22-23 (1993).

[6] EPA now apparently agrees with CAA Industry Respondents, however, that the "requisite to protect" language of § 109 requires EPA to a determine that NAAQS revision is "necessary to protect" public health and welfare. *See* EPA Resp. at 9. This is *not* the position EPA took before the lower court. *Compare* Ozone Non-State CAA Pet'rs and Intervenors Pet. (D.C. Cir. 97-1441) 37-38 ("[T]he plain meaning of the word 'requisite' is 'indispensable' or 'necessary,' suggesting that the Administrator must establish a *need* for the revised standard to avoid unacceptable health risk."), *with* EPA Resp. Br. (D.C. Cir. 97-1441) 42 (Petitioners argue that EPA must "demonstrate that the revised standard

other language of § 109 addressed by CAA Industry Cross-Petitioners, directing that EPA allow an "adequate margin of safety" in setting NAAQS and that NAAQS be revised only as the Administrator determines "may be appropriate" in light of § 109(b) and § 108. EPA App. 111a-112a; CAA ICP App. 1a-2a.

In accordance with other decisions addressing language similar to that used in the NAAQS provision, terms such as "adequate" and "appropriate" on their face do not preclude consideration of costs; they must be interpreted.[7] Interpreting them, however, is precisely what EPA (with the lower court's blessing) has refused to do.[8] Moreover, EPA never explains why "the ample margin of safety" language of § 112 does not

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is 'needed to improve demonstrably the overall public health'.... Petitioners' 'test' has no basis in the statute.").

[7] *NRDC v. EPA*, 824 F.2d 1146 (D.C. Cir. 1987) (*en banc*) (*"Vinyl Chloride"*) (interpreting the word "ample"); *cf. West v. Gibson*, 527 U.S. 212, --, 119 S.Ct. 1906, 1910 (1999) (addressing the term "appropriate").

[8] *See, e.g.*, EPA App. 19a (The nature of EPA's risk management authority is resolved under "*Chevron* step one" because the "statute *on its face* does not allow consideration of technological or economic feasibility" (emphasis added).). Curiously, EPA takes a very different position regarding what it characterizes as the "detailed statutory scheme" in CAA Subpart 2, arguing that it must be given discretion to reach a result different from the result Congress reached in Subpart 2. *See* EPA Reply 6. EPA has it backwards – broad delegations must be interpreted; detailed statutory schemes must be implemented. In this regard, CAA Industry Cross-Petitioners also note that, contrary to EPA's claim, *see* EPA Reply 8, their petition for review below challenged the *entire* ozone NAAQS rule, including 40 C.F.R. § 50.9(b).

on its face preclude consideration of costs, yet the "adequate margin of safety" language of § 109 does.[9]

Furthermore, the nature of EPA's authority to make risk management decisions when confronted with a continuum of uncertain and indistinguishable health risks has *not* been addressed by over 20 years of judicial decisions, as EPA suggests. *See* EPA Resp. 7-8. *Lead Industries* addressed, for a threshold pollutant, the issue whether EPA was *required* to consider the cost and technological feasibility of pollution controls in setting NAAQS. The D.C. Circuit, the only court besides this one with authority to review decisions on NAAQS, has expanded upon that decision since that time without pausing to reflect upon its applicability to non-threshold pollutants that call for the exercise of risk management judgment. *See, e.g.*, *NRDC*, 902 F.2d 962.

Nor is the issue resolved in EPA's favor by legislative history. EPA emphasizes that the CAA is a "technology forcing" statute. *See* EPA Resp. 12. But this proves little, because the CAA would still be technology forcing if NAAQS were set to reflect sound risk management principles. Similarly, EPA cites legislative history for the proposition that sources may have to shut down if they cannot meet the NAAQS. *Id.* at 13. But sources would still have to shut down if they could not meet NAAQS that reflect sound risk management principles.

EPA also points to legislative history from the 1977 Amendments to the CAA suggesting that the requirement that EPA obtain the advice of an independent committee on adverse health, welfare, social, economic, and energy effects

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[9] *Compare* EPA Resp. 9 n.6, 17, *with* CAA Ind. Cross-Pet. 9-11 *and* Midwest States Br. 13.

of a NAAQS revision should not be used to reject state implementation plans, and that this information "may be of interest" to Congress in fashioning future legislation. But the requirement of § 109(d) that this information be developed in conjunction with decisions on NAAQS revisions suggests that it *is* to be considered by EPA, and nothing in the statute or the legislative history cited by EPA suggests otherwise.[10]

In light of its understanding that certain pollutants might present no threshold for health effects, Congress in 1977 ultimately rejected an approach suggested by some that NAAQS "are to protect against all known or anticipated effects . . . [since] this no risk philosophy *ignores all social and economic consequences and is impractical.*"[11] EPA does not even address this legislative history, which suggests that

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[10] *See* CAA Ind. Cross-Pet. 5, 22. Indeed, the Government and CBT's citation to Committee Reports, and to provisions of the 1990 Amendments to the Clean Air Act that are separate from § 109, *see* EPA Resp. 15; CBT Resp. 2, in order to explicate the intent of the 1970 and 1977 Congresses in enacting the provision at issue here, stretches the claim that Congress was clear in narrowly prescribing the Agency's discretion in setting NAAQS. *South Dakota v. Yankton Sioux Tribe*, 522 U.S. 329, 355 (1998) ("[w]e have often observed... that 'the views of a subsequent Congress form a hazardous basis for inferring the intent of an earlier one.'") (citation omitted).

[11] *See* H.R. Rep. No. 95-294, at 127, *reprinted in* 1977 Legis. Hist., at 2594; CAA Ind. Cross-Pet. 5-6, 9, n.30; *see also* H.R. Rep. No. 95-294, at 110, *reprinted in* 1977 Legis. Hist., at 2577 (recognizing unavailability of thresholds on which to base NAAQS); *id.* at 106, *reprinted in* 1977 Legis. Hist., at 2573 (noting that NAAQS are to reduce, but not eliminate, risk and that the combination of the "Prevention of Significant Deterioration" *and* NAAQS programs would serve to provide for "maximum *feasible* protection") (emphasis added).

risk management authority should be exercised in light of the broader purposes of the Act.[12]

EPA is left with little else except to assert that CAA Industry Cross-Petitioners' view of "wise social policy" differs from that of Congress, EPA Resp. 13, without ever explaining why Congress' statement of policy must be ignored in construing that statute. EPA's view of "wise social policy," of course, precludes consideration of both direct and indirect public health risks associated with NAAQS revision (e.g., risks associated with increased UVB radiation exposure and disruption to the congressional ozone reduction program). But Congress wrote § 109 to focus on the "public" health, and these considerations are clearly relevant to the public health.

Moreover, Congress explained that the purpose of the Act is to promote health *and* welfare *and* the productive capacity of the population. CAA § 101(b)(1), CAA ICP App. 1a. If anything, this statutory language and legislative history indicate that Congress knew that a profligate commitment of money and resources to address one set of uncertain risks could increase, or limit the means to cope with, other more serious risks.[13]

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[12] ALA's extended discussion of legislative history, *see* ALA Resp. 14-24, is similarly off the mark because it does not address congressional intent regarding the exercise of risk management judgment for non-threshold pollutants.

[13] In this regard, EPA does not dispute that its estimate of the costs of attaining the ozone standard outweighs the benefits, and that the costs of attaining the PM standards are an extraordinarily-high $37 billion annually. And while EPA suggests that it has "historically *over*estimated the actual cost" of NAAQS implementation, we know in this case that the Council of Economic Advisers concluded that EPA may well have substantially *under*estimated those costs. *See* Memorandum from Alicia

CONCLUSION

The issue of EPA's discretion to consider "costs" when confronted with a continuum of uncertain health risks is one of great importance. Because EPA's NAAQS decisions have such extraordinary impacts on society and the national economy, and because this Court can evaluate whether the nondelegation doctrine constrains the Agency's action here only by addressing the nature and scope of EPA's authority to define "intelligible principles" on remand, CAA Industry Cross-Petitioners request that the Conditional Cross-Petition in No. 99-1431 be granted.

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